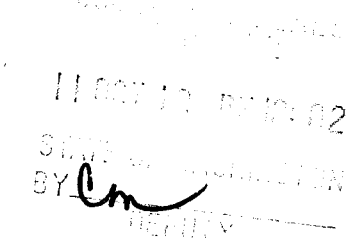

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON
Case No. 42013-9-II

Julie Eastman,
Respondent
v.

Puget Sound Builders NW, Inc., a Washington corporation,
Petitioner,

and

Commercial Interiors, Inc., a Washington corporation, Cochran, Inc., a Washington corporation, Star Dog Flooring, Inc., a Washington corporation, The Floor Guys,

Respondents.

BRIEF OF RESPONDENT JULIE EASTMAN

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2. Whether Julie Eastman may also pursue her claim under *White Pass Co. vs. St. John,* which imposed a nondelegable duty to ensure that Macy's floors were safely installed with respect to Macy's employees.

3. Whether Julie Eastman may also pursue her claim under the Restatement (Second) of Torts §§ 429 and 426, under which general contractors are held liable for the negligence of their independent contractors.

4. Whether Julie Eastman may also pursue her claim under the Restatement (Second) of Torts §383, which imposes possessor liability based on the acts and activities PSB carried out on behalf of Macy's.

5. Whether Julie Eastman may also pursue her claim under the Restatement (Second) of Torts §384, which imposes possessor liability for dangerous conditions created on the land while the work was in PSB's charge.

6. Whether PSB's liability for the dangerous hidden floor condition continued after PSB temporarily turned the premises over to Macy's, for the purpose of allowing Macy's employees to walk on that floor during store hours.

7. Whether Julie Eastman was properly allowed to pursue her claim against PSB where the evidence supported a reasonable inference that PSB was jointly responsible for carpeting over an open electrical box during its control and charge of the premises.

II. COUNTER STATEMENT OF THE CASE

On November 18, 2006, Julie Eastman was working as a sales associate at the Macy's South Hill Mall in Puyallup in the Women's Sportswear section when she stepped into a hole overlaid by carpeting. She stumbled and sustained serious injuries. CP at 12.

After the incident, Shelley Louderback, the Puyallup Macy's store manager, inspected the area where the incident occurred. CP at 232, Louderback Dep at pp. 16- 17. She observed an indentation in the carpet where Mrs. Eastman had fallen. CP at 232, Louderback Dep at p. 16, lines 18-21.

Christopher Fergelic, the maintenance technician for Macy's, discovered that the indentation was caused by an uncovered electrical outlet box that had been carpeted over. He then installed an electrical outlet cover over the outlet box. CP at 238-242; Fergelic Dep. at pp. 18-25.

The store was undergoing remodeling at the time, which included carpeting work. Prior to this incident, PSB had entered into an agreement with Macy's on July 24, 2006 to perform work for the Puyallup Macy's Mall Expansion (remodel) project. CP at 66-76.

The project involved multiple phases and spanned for over a year. Puget Sound Builders, ("PSB") was the general contractor on the site. PSB subcontracted portions of the work to a flooring company, Commercial Interiors, Inc., ("Commercial Interiors"). CP at 26. Commercial Interiors then contracted with subcontractors Star Dog Flooring ("Star Dog") and The Floor Guys ("Floor Guys") to perform this work. CP at 56, 59.

Pursuant to PSB's contract with Macy's, PSB was required to have a night supervisor at the project to supervise the work of the subcontractors. Roger Redden acted as PSB's night supervisor during the Puyallup Macy's Project. CP at 136.

PSB was aware that there were outlet covers that were removed during the demolition process and needed to be replaced once the new carpet was put in. CP at 143-144, p. 20:1-4; pp. 71-72:4-16. PSB was aware that missing outlet covers posed a hazard and undertook inspections to discovery those condition. During the remodel phase, the flooring work was performed on "Pads" which were worked on at night, and inspected by PSB and Macy's before Macy's opened for the day. CP at 160, pp 42-43: 17-14.

Roger Redden testified that he "evaluated" the work performed by the carpet installers, and it was his habit to walk through the evaluation with a Macy's manager or employee, looking for defects. CP at 142, pp. 55-56; 24-22; pp. 67;68: 17-9. PSB and Macy's inspected each stage of the carpet remodel to look for tripping hazards, and "a hole in the floor, or any other type, that could create a hazard and would not be a safe shopping environment". CP at 158, pp. 43-45:7-7.

The trial court denied PSB's motion for summary judgment dismissal of Julie Eastman's claims. Thereafter, this Court granted discretionary review, and directed PSB to file its brief. PSB's brief does not contain assignments of error.

III. STANDARD OF REVIEW

An appellate court will only review a claimed error which is included in an assignment of error or which is clearly disclosed in the associated issue pertaining thereto. RAP 10.3(g). An appellant must provide "concise statements of each error" that the lower court allegedly committed. RAP 10.3(a)(4). The Court of Appeals may refuse to consider any arguments not properly identified through an assignment of error, with the required concise specification of the errors below.

Boyle v. King County, 46 Wn.2d 428, 282 P.2d 261 (1955); *Haver v. Marsh*, 16 Wn. App. 175, 181, 132 P.2d 1024 (1943).

An appellate court reviews an order or denial of summary judgment *de novo*, performing the same inquiry as the trial court. *Jarr v. Seeco Const. Co.*, 35 Wn.App. 324, 328, 666 P.2d 392 (1983). The well known standard for resolving summary judgment is set forth in the brief of Star Dog Flooring, and need not be repeated here.

In addition, the Court of Appeals may affirm the trial court on any alternative basis supported by the record. *State v. Vanderpool,* 145 Wn. App. 81, 85, 184 P.3d 1282 (2008).

IV. SUMMARY OF ARGUMENT

In this case, Julie Eastman's right to seek relief from PSB may be affirmed on numerous bases. As general contractor, PSB was legally and factually in charge and control of Macy's premises at the time that a wide open electrical box was hidden underneath a new carpet. The trial court properly denied PSB's motion for summary judgment dismissal, based on ample evidence that PSB had a legal duty to third parties to prevent the serious injuries suffered by Julie Eastman when she stepped into the hidden electrical box.

The trial court's ruling may be affirmed on multiple, independent grounds: (1) under the Restatement (Second) of Torts §328E, because PSB's undisputed occupation and control over the Macy's floor where the open electrical box was hidden raised PSB's duty as a "possessor" of land; (2) under the rule of *White Pass Co.,* under which PSB owed a nondelegable duty to protect Macy's and its employees from harm; (3) under Restatement §§426 and 429, which hold a general contractor liable for the negligence of the principal; (4) under the Restatement §383, which imposes possessor liability based on acts and activities PSB carried out "on behalf of" Macy's; and (5) under the Restatement (Second) of Torts §384, which imposes possessor liability for dangerous conditions created on the land while the work was in PSB's "charge".

PSB tries to escape its possessor liability by arguing that Macy's "accepted" the dangerous condition when PSB temporarily turned the premises over to Macy's during store hours. PSB's work on the Macy's premises was neither completed nor accepted. Moreover, the completion and acceptance doctrine has been rejected in Washington, and the Restatement (Second) of Torts §385 holds a contractor liable for

dangerous conditions even "after his work has been accepted by the possessor ..."

Finally, even if PSB were not liable for the torts of its independent contractors, Julie Eastman and the other co-defendants provided ample evidence of PSB's direct supervision and participation in the work where the electrical box was left open and carpeted over. This evidence created material issues of fact and reasonable inferences of liability which further supported the trial court's decision in this case. Julie Eastman respectfully asks that this Court affirm, and allow Julie Eastman her day in court on the claims against PSB.

V. ARGUMENT

A. The Trial Court Properly Ruled that PSB Assumed The Duty Of A Possessor of Land Under Restatement §328E

In this case, the trial court properly ruled that PSB assumed the duty of a "possessor" of land by virtue of its extensive control over the premises when the dangerous flooring condition was installed. Washington courts have adopted the definition of "possessor" from the Restatement (Second) of Torts §328E (1965):

> (A) a person who is in occupation of the land with intent to control it, or

> (B) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or
>
> (C) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)."

Gildon, 158 Wn.2d at 496. The duty of a "possessor" under §328E extends to those who exercise control over a property, even if they are not the true owners. *Gildon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 496, 145 P.3d 1196 (2006); *citing* 65A C.J.S. *Premises Liability* § 381 (2000) (liability for a dangerous condition on property may be predicated upon elements of occupancy, control, possession, and/or special use of premises; the existence of only one element can give rise to the duty); *accord Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 327-28, 666 P.2d 392 (1983).

In determining whether or not the right to control exists, the court can consider such factors as the parties' conduct and the terms of their contracts. *See Morris v. Vaagan Brothers Lumber, Inc.*, 130 Wn. App. 243, 251, 125 P.3d 141, 146 (2005) (court examines employer's "right of control" and "terms of their contract" when evaluating liability to employee of an independent contractor). For example, in *Jarr v. Seeco Const. Co.*, the court considered a real estate broker's contractual

authority over the premises of a condominium in upholding a claim of "possessor" liability under §328E. The plaintiff, Gary Jarr was touring an open house at the condominium when some sheet rock fell, injuring his leg. *Jarr,* 35 Wn. App. at 325. Jarr sued both the condo owner and the listing real estate broker, Terrace Realty, whose agent had been outside in his car when the injury occurred. The trial court granted Terrace Realty's motion for summary judgment dismissal. On appeal, the Court of Appeals reversed, finding factual issues on Terrace Realty's tort duty as a possessor of land under Restatement § 328E.[1] Specifically, the court relied on a simple factual allegation that Terrace Realty had been granted complete charge over the open house, and was in control of the site and building during the showing of units. *Jarr*, 35 Wn. App. at 329. Based on this information alone, the Court of Appeals found a factual issue precluding summary judgment.

Here, as in *Jarr*, there is powerful and undisputed evidence supporting PSB's substantial possession and control over the premises where the dangerous condition was created. There is no dispute that, in

[1] This evidence was also sufficient to raise an issue of fact on Terrace Realty's liability under the Restatement (Second) of Torts § 383, discussed in argument section D, below.

its capacity as general contractor, PSB exercised extensive control over the premises, including the construction zone where the carpeting was laid over the open electrical box. PSB's role and special permission as general contractor on the premises continued throughout the contract period, which included the date on which the hazardous condition was created and the date of injury.

PSB's contractual responsibility with respect to safe worksite premises applied "at all times" during its contract, not only during the time it was on site, but also during the daylight hours, when the public was at the store. Under its Lump Sum Contract, PSB was required to:

> provide sufficient, safe and proper facilities and safeguards at all times for the prosecution of the Work and the inspection of the Work by the owner and for the protection of the public from injury.

CP at 135-136. Thus, PSB legally and factually possessed the right and responsibility to control safety on the Macy premises during its entire course of work.

Under the contract, PSB had duties of inspection, as well as warning of conditions on the property caused by the work. CP 67, 75 and 134-136. PSB had control over "all safety precautions" and retained the right to enter the premises at any time without special instruction or

authorization from Macy's. Once again, the contract provides evidence as to the extensive level of control that PSB had over the Macy's property, as specified in paragraph 15:

> **Protection of Work, Property and Persons.** In an emergency affecting the safety of life or of the work of adjoining property, the Contractor, without special instructions or authorization from the Architect or Owner is hereby permitted to act, at his discretion, to prevent such threatened loss or injury, and he shall so act, without appeal, as if so instructed or authorized.

CP at 134-136, Lump Sum Contract, Par. 15(d). PSB had a right to enter onto the premises at any time to repair any and all damage or prevent injury that was the result of their work. PSB also had the right to enter onto the premises and act, at its discretion, and without the express permission of Macy's, to prevent threats to loss or injury. PSB cannot now argue that it had no control over the premises while acting as the general contractor on this project.

The rule of liability for contractors under the Restatement §328E makes good sense, and is supported by sound public policy. A general contractor who is given broad contractual control over a worksite is in a superior position to prevent and remedy hazardous conditions arising on the property during that possession, and to insure for those conditions.

> The reasons the law imposes liability on the person who controls the property is self-evident: only the party who controls the land can remedy the hazardous conditions which exist upon it ...

Bloomington v. Kuruzovich, 517 N.E.2d 408, 1987 In. App. LEXIS 3406 (Ind. Ct. App. 1988). In this respect, the public policy favoring "possessor" liability for contractors is more powerful than it is for the landowner "possessor" who played no active role in the creation of the dangerous condition. PSB was the possessor in charge at the time that Macy's floor was being torn up and the hazardous conditions created and hidden. During this time of possession, PSB had the undisputed right and responsibility to control the worksite, prevent others from entering the land, supervise the workers and contractors assisting in its completion of the work, and restore the premises to a condition safe for members of the public, like Julie Eastman.

PSB's right of control and supervision over the property was broad and unfettered. In addition to its contractual right and responsibility to control all the site specific conditions of its work, PSB had the right to enter onto the Macy's property, without Macy's express authority, to do whatever it deemed necessary to prevent threats of loss or injury. The trial court properly recognized that PSB had a legal duty, just as any

other possessor with control over premises, to keep the land safe for third parties.

PSB attempts to argue that its duty as a "possessor" in control of its worksite does not exist for injuries occurring after normal construction hours. See PSB's Brief, p. 23. This argument, of course, is absurd. There is no dispute that the wrongful act occurred during PSB's period of supreme charge and control over the worksite. In sum, PSB's right and duty to exercise control over safety was in effect during the most relevant time frame – when dangerous condition was created, and did not terminate during Macy's working hours. It makes no sense to let PSB "off the hook" on workplace safety issues merely because Macy's opened its doors to the public from 8:00 a.m. to 6:00 p.m. PSB's duty as a possessor is established by the undisputed possession and control exercised over the premises at the time that the hazardous condition was created, and throughout the contract.

B. PSB Also Owed Macy's Employees A Nondelegable Duty To Ensure That Its Floors Were Properly Installed By Its Agents And Subcontractors.

PSB is also liable for the torts of its subcontractors under the nondelegable duty owed to Macy's (and Mayc's employees) under

White Pass Co. vs. John, 71 Wn.2d 156, 427 P.2d 398 (1967). This nondelegable duty provides another basis for affirming the trial court.

Generally, a principal may be liable for an independent contractor's negligence when it occurs within the scope of the contractual duties. *White Pass Co. v. St. John,* 71 Wn.2d 156, 427 P.2d 398 (1967); *see also Board of Regents of the University of Washington v. Frederick & Nelson,* 90 Wn.2d 82, 84, 579 P.2d 346 (1978). In *White Pass Co.,* the property owner contracted with general contractor St. John to enlarge a ski lodge. St. John then hired a flooring subcontractor. The subcontractor was negligent in applying a volatile floor material which caused a fire and extensive damages. *White Pass Co.,* 71 Wn.2d at 157. The trial court dismissed the claim against St. John finding that the subcontractor was an independent contractor. *Id.* at 158.

The Supreme Court found error, holding that the duty to lay flooring in a careful and prudent manner was nondelegable, with respect to the contracting owner:

> We find error assigned to the trial court's conclusion that because the subcontractor who laid the flooring was an independent contractor over whom the respondent exercised no supervision and control, the respondent was not responsible for the negligent act of the employees of the subcontractor. As appellant contends, the duty to lay the flooring in a careful and prudent manner so as not to

> damage the property of the owner was a nondelegable duty of the general contractor. The fact that the respondent, by virtue of its contract with the subcontractor, exercised no supervision and control over the manner in which the work was performed could not absolve it from its responsibility under its contract with appellant.

Id. at 160; *see Board of Regents of the University of Washington*, 90 Wn.2d at 84. "As far as [the general contractor's] relations with the owner are concerned, the subcontractor employed by him is his agent for whose negligence he is responsible." *White Pass,* 71 Wn.2d. at 161; *Allstate Ins. Co. v. Hughes,* 358 F.3d 1089, 1093 (9th Cir. 2004) (quoting *White Pass*). The purpose of the rule is to prevent the general contractor from escaping its duties to the party with whom it contracted by hiring a subcontractor to do the work.

Like the general contractor in *White Pass,* PSB had a nondelegable duty to ensure that the floors were properly installed. Under this duty, PSB would be liable even if there were no evidence of PSB's wrongful supervision and joint participation in the negligent work that covered the open electrical box on Macy's floor. Julie Eastman is a Macy's employee, protected by the express terms of the Lump Sum Contract. As a Macy's employee, Julie Eastman was well within the zone of nondelegable protection afforded to Macy's by *White Pass.* Thus,

even if PSB could credibly claim it had no responsibility for supervising and participating in the dangerous floor installation, PSB would remain liable under *White Pass.*

C. Julie Eastman's Claims Against PSB Are Also Supported By The Restatement (Second) of Torts §§426 and 429, Which Hold General Contractors Liable For Their Independent Contractors' Negligence.

PSB may also be held liable for the torts of its independent contractors under the Restatement (Second) of Torts, §§ 429 and 426 (1965). These sections provide additional independent bases for affirming the trial court which do not require independent evidence of PSB's negligence.

The trial court's ruling also finds support in the Restatement (Second) of Torts § 426 (1965). Under this rule, the general contractor may be liable for the negligence of an independent contractor where that negligence lies solely in the improper manner in which he or she does the work, thereby creating a risk of harm that is inherent in the work. This general rule of liability for subcontractor negligence states:

> Except as stated in §§ 428 and 429, an employer of an independent contractor, unless he is himself negligent, is not liable for physical harm caused by any negligence of the contractor if:
> (a) the contractor's negligence consists solely in the improper manner in which he does the work, and

(b) it creates a risk of such harm which is not inherent in or normal to the work, and
(c) the employer has no reason to contemplate the contractor's negligence when the contract was made.

Restatement (Second) of Torts § 426 (1965). The Comments explain that the narrow type of "collateral negligence" for which the general contractor **is not** liable involves abnormal negligence behavior that is outside the realm of contemplation:

> . . . Thus an employer may hire a contractor to make an excavation, reasonably expecting that the contractor will proceed in the normal and usual manner with bulldozer or with pick and shovel. When the contractor for his own reasons, decides to use blasting instead, and the blasting is done in a negligent manner, so that it injures the plaintiff, such negligence is "collateral" to the contemplated risk, and the employer is not liable. ...

Id. at Comment a. The Restatement cites to several historic cases as basic examples of the types of independent contractor negligence that are not collateral, for which an employer or general contractor is properly liable: "Contractor, installing a sewer in the street, left a hole unguarded" and "Contractor, laying water pipe in the street, left the trench unguarded." *Id.*, Reporter's Notes, *citing McCarrier v. Hollister,* 15 S.D. 366, 89 N.W. 862 (1902); *Thomas v. Harrington,* 72 N.H. 45, 54 A. 285,

65 L.R.A. 742 (1903). In this case, PSB is subject to the Restatement's rule of liability because a flooring contractor's failure to cover a hole in the floor is not "collateral" for purposes of § 426 in the Restatement.

PSB is also liable under the Restatement (Second) of Torts §429, which holds a principal liable for an independent contractor's torts where the other contracting party reasonably believes that the services are rendered by the general contractor "or by his servants":

> One who employs an independent contractor to perform services for another which are accepted in the reasonable belief that the services are being rendered by the employer or by his servants, is subject to liability for physical harm caused by the negligence of the contractor in supplying such services, to the same extent as though the employer were supplying them himself or by his servants.

Restatement (Second) of Torts, §429 (1965). Under this section, it is not necessary that the injured person have herself accepted the services. *Id.*, at Comment a. The Comments provide the following example to show how a contractor may be liable to a third party for the negligence of its subcontractor:

> The rule stated in this Section subjects the employer of the contractor to liability irrespective of whether the negligence of the contractor consists in supplying defective appliances by which the services are to be rendered or in carelessness in the detail of rendering them.

> Thus, if an undertaker who has contracted to conduct a funeral, instead of supplying his own cars, contracts with an automobile company to supply transportation for the family and mourners, the undertaker is liable to either a member of the family or a mourner, who is injured by the defective condition of the car supplied by the automobile company or by the careless driving of one of its chauffeurs.

Restatement (Second) of Torts § 429, Comment b (1965). The foregoing example is analogous to this case. PSB has contracted with Macy's for a remodel with a floor that would be safe for employees and the public. Instead of doing the work on its own, PSB subcontracted with others for assistance. Like a mourner in Comment b, Julie Eastman was injured by the dangerous condition of the work supplied. Just like the undertaker, PSB may be held liable.

The foregoing Restatement sections, holding PSB liable for subcontractor negligence, make perfect sense from a public policy standpoint. Pursuant to its contract, PSB was charged with complete control over the work and safety issues related thereto. PSB was in the best position to coordinate and supervise the performance of the work, to hire responsible subcontractors capable of completing the work in a safe manner, inserting indemnification clauses in its subcontractor agreements, and purchasing insurance (as here) to guard against injuries

arising from dangerous conditions that might be created during its work. There is no good reason for allowing the general contractor to escape liability for damages to the owner's employee.

D. Julie Eastman's Claims Against PSB Are Also Supported By The Restatement (Second) of Torts §383, Which Imposes Liability On Persons Acting On Behalf Of A Possessor

The duty of care imposed in the Restatement (Second) of Torts §383 provides a second independent basis for affirming the trial court's decision that Julie Eastman should have her day in court against PSB.

Under Restatement §383, a contractor working on land on behalf of a possessor will be held to the same standard of liability:

> One who does an act or carries on an activity upon land on behalf of the possessor is subject to the same liability, and enjoys the same freedom from liability, for physical harm caused thereby upon and outside of the land as though he were the possessor of the land.

Restatement (Second) of Torts §383 (1965); *Jarr v. Seeco Const. Co.*, 35 Wn.App. 324, 327-28, 666 P.2d 392 (1983) (realtors opening condominium units for show may be subject to premises liability under §383, as well as §328E). In its brief, PSB admits that the liability of a possessor may be liable derivatively for those who were acting on behalf of a possessor. See PSB Brief, at p. 21. In this case, there is no

dispute that PSB was carrying on the activity of a general contractor on behalf of Macy's. PSB may properly be held responsible for the negligent acts of those subcontractors and employees over whom it exercised direct control and supervision. This provides an alternative basis for affirming, and allowing Julie Eastman to proceed on her claims of tort responsibility against PSB.

E. The Trial Court's Decision Is Also Supported By The Restatement (Second) of Torts §384, Which Imposes Liability On Those Who Create A Dangerous Condition

PSB's duty to Julie Eastman is also supported by the Restatement (Second) of Torts §384. This provides a third basis for affirming the trial court's decision. As the general contractor, PSB is properly subject to the same liability as the possessor of the land "for physical harm caused to others upon the land by the dangerous character of the condition [created by PSB] while the work is in [PSB's] charge." Restatement (Second) of Torts §384; *see Williamson v. Allied Group, Inc.*, 117 Wn. App. 451, 72 P.3d 230 (2003). The person making the repairs on another's is "bound to take reasonable care therein, so that his act may not endanger those whom he should expect to use the premises ..." *Williamson*, 117 Wn. App. at 456 (quoted citation omitted).

This liability continues until the contractor's work is terminated, after which time the liability is governed by §385 (discussed below). *See Id.* at 233 (noting that the liability extends throughout the time frame that the work is under the contractor's charge).

In *Williamson,* a contractor was hired to enter onto the premises of an apartment complex for the purpose of reconstructing a footbridge. Although the contractor had taken control of the footbridge area and blocked off access, the landlord retained control of a grassy slope which provided an alternative route of travel. A tenant, unable to use the bridge, fell and injured herself when she was crossing the grassy slope. The trial court granted summary judgment and dismissed the claims against the contractor.

The Court of Appeals reversed, and ordered the claim against the contractor to go to trial. The Court ruled that the phrase "while the work is in his charge" does not limit the contractor's liability spatially to the specific site under the contractor's direct physical control. Rather, it limits the contractor's liability temporally to the dangerous condition and harm occurring while the contractor is engaged in its work. *See Williamson,* at 457. (citing *Staub v. Toy Factory, Inc.*, 749 A.2d 522,

534 (Pa.Super.2000)(citing Restatement (Second) of Torts § 385 (1965)). The Court reasoned that a jury could have found that the contractor, by closing off the footbridge without seeing to the provision of a safe alternate route or providing warnings, created a dangerous condition on behalf of the landlord while the work was in its charge.

With *Williamson*, the Court made it clear that PSB cannot escape liability simply because it had "gone home for the day" when Julie Eastman was injured. PSB's duty and liability arises from the time when the premises were under its control – this is the time when the plate was omitted and the dangerous condition was hidden by carpet.

Until its Lump Sum Contract work was complete, PSB continued with the liability of a possessor for the ongoing work within its charge. The contractual terms made it clear that PSB was responsible throughout the period of work, including during Macy's open hours:

> He [PSB] shall erect and properly maintain at all times, as required by the conditions and progress of the Work, all necessary safeguards as required by conditions and progress of the Work, all necessary safeguards for the protection of workers and the public...

CP at 135, Lump sum Contract, Paragraph 15(b).

In this case, PSB was still performing work as a general contractor

at the Macy's site when Julie Eastman was injured. The Macy's site was still "in its charge" during the entirety of the contract period, which included the period of time when the plate was omitted from the electrical box.

F. Even If The Injury Had Occurred After PSB's Work Was Completed And Accepted By Macy's, PSB Would Remain Subject To Liability

PSB also argues that any responsibility for Julie Eastman's injuries was terminated when PSB turned over the carpeted floor (with its hidden hazard) for Macy's use. CP at 269-270. This argument is without merit, and contrary to Washington's rejection of the ancient doctrine of completion and acceptance. First of all, as discussed above, PSB's work remained within its charge until the completion of the contract.

However, even if the contracted work was completed and accepted, PSB would remain liable for its hazardous conditions under the Restatement of Torts (Second) §385:

> One who on behalf of the possessor of land erects a structure or creates any other condition thereon is subject to liability to others upon or outside of the land for physical harm caused to them by the dangerous character of the structure or condition after his work has been accepted by the possessor, under the same rules as those determining the

> liability of one who as manufacturer or independent contractor makes a chattel for the use of others.

Restatement (Second) of Torts at §385 (1965) (emphasis added). Thus, even if Macy's had accepted the latently defective floor, PSB may be still be held liable for physical harm caused to Julie Eastman as a result of the dangerous condition created by its work.

In *Davis v. Baugh Industrial Contractors, Inc.*, 159 Wn2d. 413, 417, 150 P.3d 545 (2007), the contractor (Baugh) assembled and installed high density polyethylene pipes underground. The project was completed and handed over to the owner of the facility, who accepted the work. Thereafter, the facility owner suspected a leak in one of the underground pipes. While attempting to pinpoint the leak, one of the workers was killed. The worker's daughter and personal representative filed a negligence suit against Baugh, among other defendants. The trial court granted summary judgment for Baugh on the ground that the completion and acceptance doctrine relieved Baugh of liability for negligence after the work was completed and accepted by the property owner.

The Court of Appeals reversed, and in so doing, joined the vast majority of states abandoning the ancient completion and acceptance

doctrine. In discussing the decision to abandon the completion and acceptance doctrine, the Court noted:

> We find it does not accord with currently accepted principles of liability because it was grounded in the long abandoned privity rule that a negligent builder or seller of an article was liable to no one but the purchaser.

Id. at 417-418. The court pointed to the important public policy considerations in its statement that "we have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law." *Id.* at 418.

The completion and acceptance doctrine, barring liability for a contractor's negligent work, is no longer the law in Washington. PSB's argument that it is not liable for injuries sustained by Julie Eastman because they had stopped work for the day and were not onsite when the accident occurred is contrary to Washington law.

G. The Trial Court Properly Denied Summary Judgment Based On Evidence That PSB Breached Its Duties To Julie Eastman

The evidence shows that PSB and its crew were actively involved in the flooring work on the night that the hazardous open electrical box

was carpeted over. This evidence and the reasonable inferences therefrom, supports a finding that PSB was jointly responsible for creating the hazardous hidden condition, and that PSB knew or should have known that the missing electrical box plate should have been recognized, located and installed before the public was invited into the job site.

A landowner's duty to an invitee is set forth in §343 of the Restatement (Second) of Torts, which has been adopted by Washington Courts. *Kamla v. Space Needle Corp.*, 147 Wn.2d 114, 124, 52 P.3d 472 (2002). PSB does not dispute the basic duty, as set forth in the Restatement (Second) of Torts at §343:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (A) knows or by the exercise of reasonable care would discovery the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (B) should expect that they will not discovery or realize the danger, or will fail to protect themselves against it, and
>
> (C) fails to exercise reasonable care to protect them against the danger.

Restatement (Second) of Torts, §343; quoted in PSB's Brief, p. 25.

In this case, powerful evidence was presented to show that PSB as the general contractor with ultimate responsibility, was directly responsible as both supervisor and contractor in creating the hazardous condition. The evidence showed that PSB failed to use reasonable care during the inspection process, and the evidence supported a finding that PSB had, at the very least, constructive notice of the hazardous condition.

Much of the evidence of PSB's active involvement in the flooring work during the relevant timeframe is already detailed in the briefs of PSB's own contractors, who worked directly under PSB's charge on the evening when the open electrical box was hidden under the carpet. Star Dog Flooring and Commercial Interiors. See Star Dog Brief, pp. 1-2, 4, 14-16; Commercial Interiors Brief, pp. 1-2, 6-7, 10-11.

Ms. Louderback, the manager of the Macy's store where this accident occurred, testified that during the remodel phase, the flooring work was performed on "pads" which were worked on at night, inspected by Puget Sound Builders NW, Inc., and Macy's and then turned back over to Macy's following inspection. CP at 158, Louderback Dep. pp 42-43: 17-14. Roger Redden, a PSB employee,

testified that he "evaluated" the work performed by the carpet installers, and it was his habit to walk through the evaluation with a Macy's manager or employee, looking for defects. CP 146, Redden Dep.pp. 55-56:24-22; pp. 67-68:17-9.

PSB and Macy's inspected each stage of the carpet remodel to look for tripping hazards, a "hole in the floor", or any other type of hazard that would be unsafe for the shopping environment. CP at 158, Louderback Dep. pp. 43-45:7-7.

> Macy's pre-printed inspection forms called for inspection of whether floor outlets had been covered.
>
> "Q. Has there been a problem at Macy's before, with missing outlet covers?
> A. At times, we have had missing outlet covers, yes.
> Q. And is that the reason why it appears on a preprinted form?
> A. Yes
> Q. Are the department managers aware that this is a condition that is to be specifically inspect for?
> A. Yes."

CP at 154, Louderback Dep., pp. 29:10-23.

> "Q So that was a problem that was something Macy's was aware of?
> A. Yes
> Q. And is this also something that the general contractor would have been aware of?
> A. Yes."

CP at 157, Louderback Dep, pp. 38-30: 16-1. Ms. Louderback further testified that she performed the walkthrough inspections mainly with Bret Carr of PSB. CP at 158, Louderback Dep. p.42:15-16. Shelly Louderback testified that the "depression" or "indentation" was a tripping hazard and should have been called out to be corrected. CP at 158, Louderback Dep. pp 44-45: 22-7.

PSB knew that electrical outlet covers were being removed, and had a duty to supervise and inspect to ensure that they were properly replaced. Reasonable care requires a possessor to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for the invitee's protection under the circumstances. *Tincani v. Inland Empire Zoological So., 124 Wn.2d 121, 139 (1994).*

PSB was aware that outlet covers needed to be removed before the new carpeting could be laid down. They knew that there was a risk associated with missing outlet covers, and understood that they were to inspected each stage of the carpet remodel to look for tripping hazards and other hazards in the flooring that would not be a safe shopping environment. There has been sufficient presented to show that PSB, as the general contractor with control and charge of the workplace, failed

to use reasonable care during the coordination of the work, including the inspection process, and also had actual or constructive notice of the hazardous condition.

H. Expert Opinion is Not Required To Demonstrate That Covering A Gaping Electrical Box With Carpet Violates The Standard Of Reasonable Care

PSB suggests that Julie Eastman's claims cannot survive without expert reports showing that PSB violated a special standard of care by failing to ensure that electrical outlet covers should be installed over gaping holes before being carpeted over. See PSB Brief, Argument C, 2. They are incorrect. A group of jurors do not need an expert to tell them that gaping holes must be covered before hidden by a carpet.

PSB possessed the duty of a possessor to inspect for dangerous conditions, followed by such repair, safeguards, or warning as may be reasonably necessary for the invitee's protection under the circumstances. *Tincani v. Inland Empire Zoological So.*, 124 Wn.2d 121, 139 (1994). Expert testimony is usually admitted under ER 702 if it is helpful to the jury's understanding of a matter outside the competence of an ordinary lay person. *Reese v. Stroh*, 128 Wn.2d 300 (1995). In this case, a jury of ordinary lay persons are more than capable of reviewing the evidence from Macy's and the other

contractors, and concluding that a hole hidden away by carpeting is a dangerous condition that PSB should have inspected, warned, and or safeguarded against.

Judge Chushcoff correctly rejected PSB's argument that expert testimony was necessary on this issue:

> THE COURT: Wouldn't it have been simple, in terms of the inspection, to simply have some kind of way of removing plate covers, counting them, noting any of them that were already absent, and then counting them later? It's kind of like what doctors do in surgery with putting sponges in and out of the body. I mean, wouldn't that have been a simple thing –
>
> RP (February 25, 2011) at 37, lines 12-18

On reconsideration, Judge Chushcoff again reiterated that a jury could reasonably infer that PSB, as the general contractor in charge, should have known about the hazard through reasonable inspection procedures:

> MR WEST: Short of getting on your hands and knees and crawling around and pressing on every spot to see if someone carpeted over a hole and left the plate out, there is no way that you can discover it. No one has suggested that.
>
> THE COURT: Well, there is a couple of ways. As I've suggested before, a little bit like - when we ask surgeons to count the sponges that they use when they - when you open the thing up, you can note

whether, one, are there any covers that are missing already?

MR. WEST: That's the issue, whether or not there was a cover there in the first place.

THE COURT: There is that. Then, there is the other issue, did somebody count the covers after they removed them and to protect them in some sort of way so that you know all of the ones went back that were supposed to go back?

RP (March 18, 2011), p. 14, lines 12-25 and p.15, lines 16.

THE COURT: It just seems like a reasonable inference from what we've got.

MR. WEST: I don't know that you could reasonably infer it. That's something that -

THE COURT: It seems so simple, obviously.

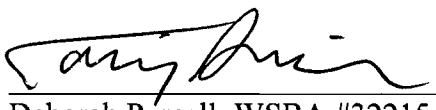
RP (March 18, 2011), p. 74, lines 1-5

As a general contractor and a possessor, PSB assumed the responsibility to repair, safeguard, or warn as may be reasonably necessary for the invitee's protection under the circumstances. A jury of laypersons, relying upon common experience is more than capable of deciding, without the need for expert testimony, whether PSB exercised reasonable care to protect Julie Eastman against the danger posed by the condition.

VI. CONCLUSION

The trial court's ruling denying PSB's motion for summary judgment may be affirmed on five grounds and ample evidence. A reasonable juror can easily find PSB jointly responsible based on its direct control and charge over the premises and the work that covered up a gaping electrical box with carpet at Macy's. PSB is also liable under alternative theories which hold it liable for the torts of its subcontractor. Julie Eastman respectfully asks this Court to affirm, and allow her day in court against the contractors in charge of the work that injured her.

RESPECTFULLY SUBMITTED this 18th day of October, 2011.



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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JULIE EASTMAN, Respondent, v. PUGET SOUND BUILDERS NW., INC., a Washington corporation, Petitioner, COMMERCIAL INTERIORS, INC., a Washington corporation, COCHRAN, INC., a Washington corporation, STAR DOG FLOORING, INC., a Washington corporation, THE FLOOR GUYS, Respondents.	No. **42013-9-II** **AFFIDAVIT OF MAILING/SERVICE**

Melinda L. Leach, being first duly sworn on oath, deposes and says:

That on the 18th day of October, 2011, she place the original and one copy of the BRIEF OF RESPONDENT JULIE EASTMAN and the original of this Affidavit in the above-entitled matter, by U.S. Mail addressed as follows:

Washington State Court of Appeals, Division Two
950 Broadway, Ste. 300
Tacoma, WA 98402-4454

That on the 18th day of October, 2011, she placed a true copy of the BRIEF OF RESPONDENT JULIE EASTMAN and this Affidavit on file in the above-entitled matter, via ABC Legal Messenger and also sent a copy

ORIGINAL

via facsimile as follows:

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Melinda L. Leach

SUBSCRIBED AND SWORN to before me this 18th day of October, 2011.

M. Y. LEWANDOWSKI NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES 10-15-12

M. Y. Lewandowski

Printed Name: MyLewandowski
NOTARY PUBLIC in and for the State of Washington residing at Puyallup
My commission expires: 10/15/12